And at paragraph 6 he said:

> 6. Defendan selanjutnya menyatakan bahawa plaintif telah dapat menyampaikan penghujahan dengan baik dan jelas ketika merujuk kepada bantahan dan cadangan bertulis beliau (Eksibit TCK-4) semasa representasi tersebut.

I also find that plaintiff was not denied a reasonable opportunity of being heard. The document (Ex. TCK-4) containing his objections and proposals which he submitted to the defendant at the enquiry was quite comprehensive. I agree with Wee Chong Jin CJ when he said in *V.C. Jacob v. Attorney-General* [1970] 2 MLJ 133:

> ... the committee of inquiry has not denied the plaintiff a reasonable opportunity of being heard merely because it has refused the plaintiff's request to be represented before it by an advocate and solicitor.

I dismissed the plaintiff's application with costs.

WILLIAM JACKS & CO. (M) SDN. BHD.

v.

CHEMQUIP (M) SDN. BHD. & ANOR.

HIGH COURT, KUALA LUMPUR
DATO' HAJI ABU MANSOR BIN ALI J.
[CIVIL SUIT NO. D5-22-870 OF 1990]
14 JANUARY 1993

CONTEMPT: Application for committal of company directors - Diversion of orders placed by plaintiff's customers to 1st defendant - Injunction obtained by plaintiff and served on defendants - Breach of injunction order - Anton Piller order obtained - Evidence of defendants' breach seized - Whether defendants were guilty of contempt - Whether claim to being "sleeping directors" a defence to committal for contempt.

SENTENCING: Custodial sentence ordered until contempt purged - Grounds of sentencing - Failure by defendants to comply with injunction order - Disobedience blatant - Orders of Court to be obeyed - Whether wrong done to administration of justice can be cured by payment of damages to plaintiff.

The plaintiff was appointed under an exclusive agency agreement to distribute Lightin Proprietary Ltd. Singapore's (LPL) products in Malaysia. The 2nd defendant whilst an employee of the plaintiff and in breach of the terms of her employment diverted orders placed by a customer of the plaintiff to the 1st defendant where she later became a director. On 30 May 1990 the plaintiff obtained and served on both defendants a mandatory injunction restraining them from *inter alia* delivering, installing or causing to be installed the equipment diverted to the 1st defendant.

The plaintiff applied for committal of the defendants for contempt on the ground that the defendants had breached the injunction order by delivering and/or causing to be delivered the equipment in question to one, Ancom Bhd. on 20 July 1990. Evidence of the purchase orders diverted and delivery note were seized from LPL's premises during the execution of an Anton Piller order obtained by the plaintiff in Singapore. The plaintiff claimed that the defendants cicumvented the injunction by getting LPL to deliver the equipment directly to Ancom instead of to the 1st defendant as originally intended and in order that it would not be traced to them, the defendants used Oilquip, which shared a common director with the 1st defendant, to

receive payments from Ancom for the equipment which payment was the 1st defendant's commission for ordering the equipment.

Held:

[1] The defendants had ample opportunity to obey the injunction order. When the defendants had all been served with the injunction, there existed a fax dated 6 June 1990 from LPL to the 1st defendant informing the defendants that delivery of the equipment for Ancom was rescheduled for shipping in mid June 1990. The defendants were definitely aware the injunction would be breached by this delivery and if they were mindful to act diligently, they should have obeyed the injunction and stopped the shipment. In failing to do so the defendants knowingly breached the order. The 1st defendant's directors and the 2nd defendant were guilty of contempt.

[2] Directors of a company who have been notified of an injunction are liable for the breach of the injunction by the company and it is no defence to claim that they were "sleeping directors".

[3] The Court sentenced 3 directors of the 1st defendant, including the 2nd defendant, to imprisonment until they purged their contempt on the ground that the 1st defendant not only blatantly failed to obey the injunction but contrived and devised means to circumvent the Court order in the face of the clear injunction of the Court. As for the 4th director, the Court sentenced him to a fine of RM5,000 in default 2 months imprisonment as a deterrent in consideration that he may not have been served with the injunction when the order was breached but was in all probability aware of the same.

[4] The wrong done to the administration of justice by the defendants' disobedience to a High Court order could not be cured by payment of damages to the plaintiff. The Court was of the view that too many people were flouting the orders of the High Court as if they were of no consequence. The Court wished to make a stand that orders of the High Court should be obeyed to avoid a breakdown in the due administration of justice.

[Application for committal allowed].

[Editorial Note: The defendants applied for stay of the committal order pending appeal alleging that the imprisonment was unlawful as no warrant of committal was issued. The Court found the allegation baseless and the order valid until reversed. Although the Court found the defendants unrepentant, the Court took into account that the defendants had served a few days of imprisonment and pursuant to O. 52 r. 8 of the Rules of the High Court 1980, fined each of the defendants RM2,000 in default one month's imprisonment to purge their contempt. As the defendants had been fined, no order was made as to their application, enclosure (79), since they were free to go after payment of the fine].

Cases referred to:

Harding v. Tingey [1864] 10 LT 323 ***(cit)***

Cities Service Oil Co. Ltd. v. Menard [1960] 24 DLR (2d) 495 ***(cit)***

Biba Ltd. v. Stratford Investments Ltd. [1973] 1 Ch 281 ***(refd)***

T.O. Thomas v. Asia Fishing Industry Pte. Ltd. [1977] 1 MLJ 151 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 52 rr. 2(5), 8

For the plaintiff - Karen J. Goonting; M/s. Paul Chong & Kraal

For the 1st and 2nd defendants and directors of 1st defendant - C.T. Chan; M/s. A.K. Lee & Co.

For the director Lim Kheng Guan - Asha Dhillon; M/s. Chung & Chan

JUDGMENT

Haji Abu Mansor Bin Ali J:

The first defendant has 4 directors. Eew Sze Chieh, the 2nd defendant is one of the 1st defendant's directors. Eew was served with this committal proceedings on the 26 September 1990. On this date also one Leong Sik Hoong was also served. Then on 3 October 1990 one other director of the 1st defendant one Lee Weng Kee was served. Then on 15 January 1991 one Lim Kheng Guan another one of the 1st defendant's directors was personally served. On the date of hearing i.e. on 2 September 1991 all the directors of the 1st defendant except Mr. Lim Kheng Guan were present but Mr. Lim Kheng Guan had filed an affidavit in reply and so was aware of the present proceedings.

The brief facts of this case are as follows. The 2nd defendant was also an employee of the plaintiff. One of the terms of her employment was not to divulge the secret of the plaintiff's company. It was alleged that the 2nd defendant in breach of the terms of her employment diverted orders placed by a customer of and meant

for the plaintiff to the 1st defendant where she later became a director.

On 30 May 1990 the plaintiff obtained a mandatory injunction against the 1st defendant's company and the 2nd defendant by which the defendants were restrained from delivering, installing or causing to be installed etc. the equipment relating to the said order, diverted to the 1st defendant.

The injunction had been duly served on the 1st defendant on the **30 May 1990** on the company's secretary and also served on 30 May 1990 on the 2nd defendant.

The crux of the present application for contempt is that the plaintiff says the defendants have breached the injunction by delivering and/or causing to be delivered equipment to Ancom Bhd. - such delivery occurring on **20 July 1990**.

The applicant having obtained the required leave then applied by this motion. The grounds of this application are as appearing in the statement filed pursuant to O. 52 r. 2(5) as well as those in the applicant's affidavit of one Tay Thiam Siew enclosure (23).

Counsel for the applicant referred to para 7 of the said affidavit in enclosure (23) - disclosing the following:

(a) On 27 and 28 February 1990 there existed an exclusive agency agreement whereby a company LPL agreed to appoint the plaintiff as the exclusive agent to distribute LPL products in Malaysia. Such exclusive agency was to be in existence till the 8 May 1990.

(b) 2nd defendant who is the director of 1st defendant was also in the employ of plaintiff until 6 March 1990.

The applicant maintains that the 2nd defendant and LPL conspired to divert the Ancom order from the plaintiff whilst the 2nd defendant was still in the employ of the plaintiff and so acted in breach of the agreement between LPL and the plaintiff.

Some examples of the orders diverted is p. 55 which were obtained from LPL's premises pursuant to an Anton Piller Order dated 18 August 1990 (pp. 77-80 of enclosure (23)) obtained in the High Court Singapore and executed therein.

As for the breach of injunction the evidence is at p. 55. The orders were dated **27 February 1990** addressed to the 1st defendant from Lightnin Proprietary Ltd. Singapore and marked for the 2nd defendant's attention. The injunction was **30 May 1990** and the delivery at pp. 55-57 were on **20 July 1990** p. 75 of enclosure (23), in Delivery Note from a forwarding agency seized from LPL office during the Anton Piller Order. The delivery was by Wira to Ancom Sdn. Bhd. of 2 units of mixer and one of another mixer dated 20 July 1990.

The serial numbers in p. 75 correspond to p. 61 (purchase order from 1st defendant to LPL dated **29 March 1990**). At p. 63 is given the anticipated date of production and anticipated date of completion as 30 May 1990 and 15 June 1990 respectively.

Page 65 is similar to the equipment in p. 63 and p. 65 makes up the equipment delivered *vide* p. 75.

In breach of the restraining order the defendants delivered or caused to be delivered the equipment.

In enclosure (55) - affidavit in reply exhibit TTS-1 **was one of the documents seized which was a copy from LPL's premises. It was addressed to the 1st defendant for 2nd defendant's attention dated 6 June 1990** and this is at p. 61 of enclosure (23).

Exhibit TTS-1 of enclosure (55) refers to TTS-31 of enclosure (23) - that the equipment *vide* order CQP0011/90 was delivered after the injunction.

Counsel submitted that on receipt of TTS-1 it was the duty of 2nd defendant to have informed LPL not to deliver. Her duty as a law abiding citizen cannot be more clear.

At this stage of the proceedings the applicant's Counsel was unable to proceed as he wanted to research on the phrase "cause to be delivered" whether the knowledge of the injunction alone is sufficient for the defendants to act to stop the purchase order.

When this case finally resumed on 27 March 1992 plaintiff was asked to give his written submission in 2 weeks from that date and the defendant to reply in 2 weeks from receipt of plaintiff's written submission and the plaintiff to reply accordingly.

The plaintiff submitted that on 20 February 1990, the 2nd defendant, whilst employed by and without the knowledge of the plaintiff became a director of the 1st defendant in

breach of the condition of her employment with the plaintiff.

On 6 March 1990 the 2nd defendant and one Steven Wang resigned from their employment with the plaintiff and took up employment with the 1st defendant, the 2nd defendant as a Managing Director.

On 20 April 1990 the plaintiff discovered that the 2nd defendant had whilst in her employment with the plaintiff diverted the orders meant for the plaintiff to the 1st defendant.

On 30 May 1990 the plaintiff obtained an injunction against the defendants restraining them from delivering LPL equipment and/or causing to deliver LPL equipment in orders belonging to/meant for the plaintiff obtained by the 1st defendant through the knowledge the 2nd defendant gained whilst she was employed by the plaintiff. The injunction was served on both the defendants on 30 May 1990.

As a result of an Anton Piller Order obtained by the plaintiff in Singapore on 18 August 1990 and in a subsequent search the plaintiff discovered at LPL's premises a **Purchase Order No. CQP0011/90 dated 29 March 1990 from the 1st defendant** confirming with LPL the order for the supply of LPL equipment for one Ancom Berhad (Ancom) in Shah Alam with the expected delivery date as at end of May 1990.

What is important to note was the fact of admission by the 2nd defendant in her affidavit that the above orders for Ancom were placed through the 1st defendant in February 1990, **before the termination of the said Exclusive Agency Agreement and when the 2nd defendant was still in plaintiff's employment.** The order for LPL equipment by Ancom was meant for the plaintiff pursuant to the terms and conditions of the said Exclusive Agency Agreement.

The plaintiff obtained a copy of the Delivery Note showing that **in breach of the Injunction,** the equipment **was delivered to Ancom on or about 20 July 1990** - after the injunction was served on the defendant.

The plaintiff therefore applies to have committed the following persons to prison for the breach of the said injunction:

(a) the 1st defendant;
(b) Eew Sze Chieh @ Yew Sze Kiat (f), 2nd defendant;
(c) Leong Sik Hoong (Leong);
(d) Lee Weng Kee (Lee);
(e) Lim Kheng Guan (Lim).

The above individuals are the directors of the 1st defendant company.

The plaintiff seeks to have committed the 1st defendant and its directors for allegedly breaching the 3rd limb of the injunction obtained on 30 March 1990 that restrains the 1st defendant and or 2nd defendant:

> from delivering and or installing or cause to deliver and or install equipment ... manufactured/produced by LPL where whose orders were obtained by the 1st defendant through the knowledge of 2nd defendant gained whilst in the employ of the plaintiff and based on information which is the property of the plaintiff.

Page 11 of the plaintiff's submission states **Lim** had knowledge of the injunction in early October 1990. Enclosure (23) was personally served on Lim on 15 January 1991.

The plaintiff's Counsel submitted that the authority that may be applicable is at p. 14 - *Harding v. Tingey* [1864] as reported in 10 LT 323 - pp. 18-21 to plaintiff's Bundle of Authorities.

The plaintiff submitted that the defendant's conduct clearly showed that they were guilty of contempt for breach since by their conduct they were able to evade the provision of the injunction.

Counsel cited the case of *Cities Service Oil Co. Ltd. v. Menard* [1960] 24 DLR (2d) 495 (p. 57 of plaintiff's Bundle of Authorities) wherein in that case the defendant having been appointed farm agent and was sued for breach of contract to act as a farm agent and a handler of its products in a certain area and an interim injunction was granted prohibiting him from handling or distributing other than those of the plaintiff. When the wife of the defendant and two drivers of the defendant's company were parties to a scheme of establishing a partnership to sell company's products in the same area and the evidence was that the defendant himself sold products other than the plaintiff's after the injunction was issued and served, it was held the defendant's conduct was to flout the Court's order.

Equally the plaintiff submitted on the facts of our present matter the defendants not only intentionally breached the injunction but also connived with LPL and Steven Wang by working out a scheme to circumvent the injunction by getting LPL to deliver the equipment directly to Ancom instead of personally delivering it to the 1st defendant as originally intended.

The Court noted that the 1st defendant's instruction in the order dated the **29 March 1990** for the delivery to the above address can only be delivery to the 1st defendant's address which appeared on the heading of the purchase order. It was clear that the equipment in the purchase order was for Ancom for it referred to LPL's reference No. 90-M-5016 in LPL's document, for Ancom (see pp. 63 and 65 of enclosure 23). In this transaction in order that it would not be traced to them the defendants used Oilquip to receive payments from Ancom for the equipment which payment was the 1st defendant's commission for ordering the equipment.

Leong's, Lee's and Lim's defence was they played only a passive role in the 1st defendant leaving the day to day running of the company to the 2nd defendant. They alleged they cannot be committed for contempt. I find merit in the applicant's Counsel's argument that directors of a company who have been notified of an injunction are liable for the breach of the injunction by the company and it is no defence if they claim they were only "sleeping directors" (see *Biba Ltd. v. Stratford Investments Ltd.* [1973] 1 Ch. 281 (plaintiff's Supplementary Bundle of Authorities). See Supplementary Bundle.

Basing myself on the authority cited case of *Harding v. Tingey* (pp. 18 to 21 of the plaintiff's Bundle of Authorities) where at the time the injunction granted was served on the defendant, the auctioneer had, on the order of the defendant, sent the advertisement of a sale to the press. From the evidence it was held that the advertisement could have been stopped if the defendant had acted with diligence but he did not do so but, a few days after, inserted an advertisement that the sale would be postponed. Motions being made to commit the defendant and the auctioneer for contempt it was held that it was of the greatest importance that the order should have been observed.

In the course of reading the cases cited by the plaintiff I had occasion to read the reported case *T.O. Thomas v. Asia Fishing Industry Pte. Ltd.* [1977] 1 MLJ 151 at 158 where His Lordship Lee Hun Hoe CJ Borneo quoted with approval the case of *Spokes v. Banbury Board of Health* and the learned Chief Justice wrote:

> In *Spokes v. Banbury Board of Health* an injunction was granted on 6 March restraining a local board of health from causing or permitting sewage, or water polluted therewith, to pass through drains or channels under their control into a river, to the injury of the plaintiff, a miller, residing about three miles below the outfall of the works of the local board. Execution of the order was stayed till 1 July. However, after 1 July they did not stop the flow of sewage into the river. They said that they had not as yet discovered any mode of deodorizing the sewage and that compliance with the order was practically impossible and would expose them to proceedings. They would also infringe an Act of Parliament. They said that there had been no wilful default and that a sequestration would be ineffectual. It would compel members of the board to resign. Held, that there had been a gross and wilful contempt, and sequestration ordered to issue. In delivering his judgment, Sir W. Page Wood V.C. made these pertinent observations:
>
> > ... the simple and only view is, that an order must be obeyed, and that those who wish to get rid of that order must do so by the proper course of an appeal. So long as it exists, the order must be obeyed, and obeyed to the letter and any one who does not obey it to the letter is guilty of committing a wilful breach of it, unless there be some misapprehension which all mankind are subject to, and which may mislead him upon the plain reading of the order. But, in this case, that the order is plain there is no doubt.

From the facts of the present case after I had considered all authorities cited I have no hesitation in holding that the defendants had ample opportunity to obey the order in the injunction. As was stated I found as a fact that when the defendants had all been served with the injunction, there **existed a fax dated 6 June 1990 from LPL to the 1st defendant informing the defendants** that delivery of the equipment for Ancom was re-scheduled for shipping in mid June 1990 (see exh. TTS-1 encl. 57). The defendants were definitely aware that by this delivery the injunction would certainly be breached. If the defendants were mindful to act diligently as decided in the case of *Harding v. Tingey* above they should have obeyed the injunction and

cause the shipment to be stopped. In failing to do so they have knowingly breached the order. I find the 1st defendant and its directors and 2nd defendant guilty of contempt.

I then proceeded to hear the defendants why I should not impose a proper sentence on a date to be fixed by the Senior Assistant Registrar. Sentence was fixed for hearing on 20 May 1993.

JUDGMENT ON SENTENCING

20 MAY 1993

After hearing pleas in mitigation from Counsel for the defendants I sentenced the 3 defendants, the directors of 1st defendant company:

(1) Eew Sze Chieh (2nd defendant);
(2) Leong Sik Hong;
(3) Lee Weng Kee.

to imprisonment until they purge their contempt. As for another director Lim Kheng Guan, he was fined RM5,000 in default 2 months' imprisonment.

I felt a custodial sentence on directors (1), (2) and (3) until they purge their contempt was justified because the 1st defendant company not only failed to obey the order of injunction but the company contrived and devised means to circumvent the Court order, in the face of the clear injunction of the Court. The gravity of their offence was in failing to see that the orders of the Court must be obeyed. In the case of director, Lim Kheng Guan, he was given the benefit of doubt that he might have been ignorant of the order but the total evidence pointed to that he would have been consulted after the company was served with the injunction in view of his vast experience and also holding directorship of a few companies and the injunction affected his 'investment'.

I now set down my reason for the sentence. At the outset of today's proceedings for mitigation Counsel for the defendant (1), (2) and (3) above applied to the Court to have the case postponed because she says steps are afoot to have matters in this case settled.

To question from the Court if this is a matter that can be settled as the injury to the administration of justice cannot be cured by the defendants settling this matter, Counsel for them replied settlement would be matters that the Court may want to take into account in mitigation before passing sentence.

I refused this eleventh hour application for a postponement. I held that this is a matter that cannot be cured by a settlement by a payment of damages to the plaintiff. The wrong to the administration of justice by their disobedience to a High Court order cannot just be settled by the payment of damages to the plaintiff. In any case if there were to be a settlement it should have been done well before the date for sentence to reflect the true remorse and repentance of the defendants after disobeying the Court's order. In fact this attempt by the defendants to sidetrack the proceeding for sentence was another of defendants' act to circumvent what was coming. I was going to have nothing of that.

I found that the acts of disobedience to the Court was in fact blatant. The 1st defendant's directors and 2nd defendant, after having been served with the order, never intended to obey it. They engaged a solicitor Lewis & Co. and one can presume that the engagement of the solicitor was to get advice on how to properly act. Inspite of getting proper advice the 1st defendant, through their directors, went on to commit a breach of the said injunction.

The 2nd defendant Eew Sze Chieh (Eew) had all the knowledge of customers and their orders gathered whilst in the plaintiff's employment. On 30 May 1990, though she had left the employment of the plaintiff, but restrained by the Court, the company through Eew diverted orders meant for the plaintiff, to the 1st defendant with the help of telexes meant for the plaintiff. This defendant Eew together with the other directors Mr. Leong and Mr. Lee never heeded the orders of the High Court restraining the 1st defendant and the company directors.

Instead of obeying the injunction of the Court and stopping to act and do things to the detriment of the plaintiff the defendant through the directors persisted in breaching the Court's orders.

For instance there was a purchase order discovered from the 1st defendant, to Lightnin (the manufacturers) dated 29 July 1990 enclosure (23) p. 61. At the foot of that order for equipments there was the words "Kindly deliver to the above address" and that address was the 1st defendant's address.

Then again in defiance of the injunction (30 May 1990) there was a telex dated 6 July 1990 to a customer - Ancom Bhd. advising Ancom that the

supplier of the equipment from then on was Oilquip (not the plaintiff) and Oilquip and the 1st defendant shared the same address. This apart, Oilquip and the 1st defendant shared also a common director and one employee Steven Wang (who had sent the 6 July 1990 telex (enclosure 64 p. 2).

By this clever manipulative act the 2nd defendant has attempted to circumvent the orders of the injunction which restrained the 1st and 2nd defendants from delivering and/or causing to deliver Lightnin equipment. By this clever process Lightnin delivers the equipment to Ancom and Oilquip receives the payment.

Since the defendants had the benefit of Counsel after the injunction was served the injunction was still breached and because of the clear terms of the injunction, Counsel for the plaintiff moved that a custodial sentence be meted out. I upheld that submission. There are just a bit too many people who flout the orders of High Court as if they are orders of no consequence. I am making a stand that orders of High Court should be obeyed else there will be a break down in the due administration of justice. In this case the defendants have not only disobeyed but attempted to manipulate and circumvent the Court's order. I therefore sentenced (1), (2) and (3) above to imprisonment till they purge their contempt.

As for director Lim Kheng Guan, his Counsel Mr. Nathan prayed that I might exercise my discretion in not passing on him a custodial sentence under O. 52 r. 8. I considered that he had not been served when the order of Court was breached. I gave him the benefit of doubt that he might be a 'sleeping' director but perhaps he is not such a sleeping director after all having put his money into the 1st defendant company and he is an accountant of some standing and also directors of a number of companies to his credit. I am failing in my duty if I say that he is such a sound sleeper because of his vast experience in company matters. I am not too sure if he was not consulted as to what to do after the injunction had been served on the 1st defendant as his investment has been directly affected. In view of this I sentenced him to a fine of RM5,000 in default 2 months to send a message, as a deterrent to other directors and a company director must look after his company and have obeyed the law of the country.

JUDGMENT IN APPLICATION FOR STAY

24 MAY 1993

On 20 May 1993 the defendants were sentenced to imprisonment till they purge their contempt. Hardly a few days passed they are applying for a stay of my imprisonment order pending appeal.

I have perused the affidavit filed by Counsel for the defendants there is a complete absence of the word apology or remorse in the affidavit filed on behalf of the defendants. The Counsel in fact made an untrue statement in the affidavit alleging that imprisonment is unlawful because there is no warrant of committal issued. I have examined the file and I find that this is an untrue statement and callously made without first ascertaining the true facts. The order is valid until reversed.

Turning to the defendants as I have said they were sentenced to imprisonment to purge their contempt. From the affidavit of their Counsel, in each case, the defendants cannot stay in prison for the various reasons assigned by each defendant. They want to be out. I find they remained unrepentant. Instead of imprisonment I have decided they each will purge their contempt by the payment of a fine as provided for in O. 52 r. 8. I fined each of them RM2,000 in default one month's imprisonment to purge their contempt. In coming to this decision I have taken into account they have served a few days of imprisonment. I will not entertain any application for a stay of this punishment of a fine. Since the defendants have been fined, I make no order in application enclosure (79) since they are free to go after payment of a fine.